

Editor's note: T & M site involved in decision was invalidated by Exxon Pipeline Co. v. Burns, Civ. NO. A82-454 (D.Alaska Oct. 22, 1985), U.S. was not a party

DAVID A. BURNS

IBLA 71-15

Decided June 10, 1977

Appeal from a decision of Administrative Law Judge E. Kendall Clarke allowing a 5-acre headquarters site (Contest No. F-033554).

Modified.

1. Alaska: Trade and Manufacturing Sites

When an applicant for an 80-acre trade and manufacturing site has demonstrated that he has used a substantial portion of that 80-acre parcel for the activity of motorcycle and snow machine testing in connection with his business of motorcycle and snow machine sales located some distance away in Anchorage, Alaska, and that parcel contains substantial improvements made in connection with this testing activity, and he has satisfactorily shown a need for and a direct and necessary economic purpose in furthering his enterprise, the applicant has successfully satisfied the requirements for this trade and manufacturing site.

2. Words and Phrases

"Headquarters." The term "headquarters" as used in the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1970), means the usual place of business, principal office or administrative center used in connection with a trade, manufacture or other productive industry.

3. Administrative Procedure: Hearings -- Rules of Practice: Evidence --
Rules of Practice: Hearings

Evidence offered on appeal from an initial decision by an Administrative Law Judge after a hearing in a contest may not be considered or relied upon in making a final decision but may only be considered to determine if there should be a further hearing.

4. Alaska: Trade and Manufacturing Sites

Where an applicant seeks 80 acres for a trade and manufacturing site, he can only obtain title to as much land in the claim as is actually occupied by improvements and used in his business. Each portion of the site need not contain substantial improvements. It is sufficient to meet the requirements of the law if the applicant can show active use of the unimproved land as an integral part of his business.

APPEARANCES: Jerry E. Melcher, Esq., of Hughes, Thorsness, Gentz, Powell and Brundin, for appellant; John W. Burke III, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Government.

OPINION BY ADMINISTRATIVE JUDGE RITVO

David A. Burns has appealed from a decision (Contest No. F-033554) of Administrative Law Judge E. Kendall Clarke, dated June 18, 1976, which approved a 5-acre headquarters site out of an application to purchase a trade and manufacturing site of 80 acres.

This current appeal has come before this Board for a second consideration. Originally, David A. Burns appealed to the Board from a decision of the Alaska State Office in 1970 after that Office had rejected his application to purchase 80 acres as a trade and manufacturing site and canceled his claim. Upon our first review of the case we determined that the record was incomplete and that a further reexamination of the facts was warranted to determine if the appellant was entitled to the land he had applied for. We, therefore, vacated the Alaska State Office decision of July 23, 1970, and remanded the case to the State office for further action by our decision of June 15, 1972, 6 IBLA 171. The case was remanded with the specific direction that:

If from the facts adduced upon reexamination, the land office is not satisfied that sufficient necessary business was conducted on the site to warrant the granting of a trade and manufacturing site, or that the claimant is entitled to purchase the amount of acreage he has filed for, a contest should be initiated and a hearing ordered. If such hearing is ordered, the appellant will have the burden of presenting the evidence necessary to establish his assertion to rights of purchase as required by law. * * *

After supplemental field examination, the Bureau filed a contest complaint against the Burns' trade and manufacturing site claim. After Burns responded to the complaint, a hearing was held in Anchorage, Alaska, on July 2 and 3, 1975. Subsequently, after posthearing briefs were filed, Judge Clarke issued his decision of June 18, 1976, which approved the 5-acre headquarters site. He found that the 5-acre parcel surrounding Burns' cabin was the primary area used as a testing site in connection with the business of motorcycle sales and that all substantial improvements made in connection with this activity are contained within that parcel.

Judge Clarke's decision presents a concise summation of the pertinent facts adduced at the hearing as follows:

It appears that Mr. Burns, the Contestee herein, has had a long relationship with motorcycles. In 1954 he joined motorcycle[s] racing clubs in California and raced at the Shasta Speedway between Redding and Anderson. In that same year he moved to Alaska and worked as a heavy equipment operator, an occupation with which he had had considerable experience previously. In 1959 Mr. Burns purchased a motorcycle franchise in Anchorage. (Tr. 130). This was the Harley-Davidson outlet. Between 1961 and 1965 he attended the Harley-Davidson service school and learned to service those motorcycles. (Tr. 130). In 1964 he purchased the Suzuki motorcycle dealership. From 1959 to 1963 his motorcycle sales and service shop was located in Eagle River, a subdivision of Anchorage. In 1964 he moved his motorcycle sales and service shop to Muldoon, another suburb of Anchorage. In 1966 he purchased the Alaska State distributorship for Scorpion snowmobiles. (Tr. 130). He now has 42 dealerships in the State of Alaska.

On December 4, [1964], the Contestee filed his Notice of Location for the trade [and] manufacturing site with the Fairbanks District Office. The Notice of Location of Settlement or Occupancy Claim in Alaska, Exhibit 1-A,

states under item nine that the trade, manufacturing or other industry for which the claim is maintained or desired is "motorcycle racetrack and boat harbor." The trade and manufacturing site is located approximately 221 miles from the city of Anchorage, not far from the town of Glennallen. The road from Anchorage to Glennallen is a paved, two-lane highway for the most part.

In 1964 the Contestee, Mr. Burns, and his son made a looping track through the north portion of the T and M site by dragging a log behind a tractor, which they then used as an enduro track for riding motorcycles. The track was sketched on aerial photo Exhibit G-4 by the Contestee. This 1969 aerial photo shows a faint line in some areas through the woods which is hardly distinguishable from other such faint lines which apparently are animal trails. (Tr. 147). He constructed a 18' by 24' log cabin in 1965 which was finished approximately in 1969. He also constructed an outhouse east of the cabin. In 1968 he constructed an oval track using a tractor. This track is plainly visible on Exhibit G-4 and appears to be a substantial improvement.

Mr. Burns testified that he used the entire 80 acres, including the Gulkana River, for testing snowmachines beginning in 1966. (Tr. 130). By doing the testing he made many improvements in the machines which apparently improved his ability to service and provide reliable machines for sale. For testing the snowmachines the main requirement is that he have new unused snow each time he makes a test run. (Tr. 254). No improvements were made on the T and M site in order to carry out the testing of the snowmachines other than the cabin. The enduro track was used for the Lion's Club races which were held in 1966. The funds from that event were used by the Lion's Club for purchasing eyeglasses for children in the Copper River valley area. (Tr. 145). The Contestee did benefit from the race to some extent as a matter of advertisement for his motorcycle sales and service business.

Over the years, Mr. Burns testified that he had used the T and M site frequently for testing motorcycles, particularly on the weekends. As a result of such testing, he had improved certain items such as forkhead bearings, chain adjustments, and carburator [sic] air cleaners. (Tr. 204-235; and Exhibit X).

* * * * *

The testimony and the evidence provided by the Contestant through realty specialist Jon Dolak shows that only five acres were used by these improvements which were directly connected to the Contestee's business. (Tr. 67). In addition, the Contestee indicated that the improvements did in fact fall within the area of five acres shown by Mr. Dolak on Exhibit 4. (Tr. 242).

It is clear from the Contestee's testimony that he is not in the boat business, even though, on one occasion he did test a hovercraft in that area. The boat channel essentially involved the scraping out of a preexisting natural channel. The Contestee now has constructed an airplane landing strip on part of the property, but this was not completed until after 1969. (Tr. 262).

* * * * *

The Judge made several findings of fact including:

[T]he airport facility was a prospective use and was not completed within the statutory period. The boat harbor was not substantially connected in any respect with the Contestee's business. The enduro track involved such small improvements that it cannot be considered substantial enough to demonstrate a requisite improvement. The use of the snowmachine indiscriminately over the entire 80 acre tract, including the Galkana River, could just as well have been conducted on any other unoccupied and unrestricted land without any improvements. * * *

From the evidence the Judge concluded that the testing activity carried out on the site was neither trade, manufacturing or other productive industry at least in an economic sense, but rather an adjunct to another trade or productive industry activity. He, therefore, restricted his consideration of the entry to the headquarters site provisions of the law.

In his statement of reasons Burns primarily objects to the Judge's restriction of his claim to the 5-acre headquarters site. He asserts that through his various activities he actively used and occupied the entire property. He concludes, inter alia, that he:

Improved on, actively used and occupied the T & M site as his principal office, administrative center and usual place of business for research, testing and development and that this activity was an integral, essential part

of his business. Economic gain by way of sales, product improvement, decreased costs, warranty savings and advertisement resulted.

He takes issue with the Judge's finding of the testing activity as an "adjunct" to another trade or productive industry. Instead he asserts:

[T]hat [his] activity resulted in economic gain and that the research, testing and development aspect of [his] business not only had a life and business identity of its own but that it was also an integral, essential part of and in fact did further the business of motorcycle and snowmachine sales and service.

The Solicitor has responded on appeal, first, that appellant has failed to show qualifications for the minimum 5-acre site and that appellant's claim should be totally rejected. He asserts that appellant has failed to show that the T & M site was an essential part of his Anchorage business. He states:

[A]t no time during the two-day hearing did Contestee demonstrate that the site was anything more than a 221-mile distant satellite operation, connected to the principal place of business in Anchorage by an amorphous umbilical cord referred to as a "test and experimental site, * * *."

To approve Contestee's claim as either a headquarters or a trade and manufacturing site would sanction a most tenuous business operation which, on the one hand generates the substance of its work in a productive location and, on the other hand, is located, with Federal approval, on the public lands and carries on a minimal level of activity related to the principal operation.

In the alternative the Solicitor requests that the initial decision of the Judge be sustained.

[1] As has been set forth before, appellant's application has been considered pursuant to Section 10 of the Act of May 14, 1898, as amended, 43 U.S.C. § 687(a) (1970). Section 687(a) provides for the sale of not more than 80 acres to:

Any citizen of the United States * * * in the possession of and occupying public lands * * * in good faith for the purposes of trade, manufacture, or other productive industry * * * upon submission of proof that

said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry. * * *

The governing regulations, 43 CFR 2562.3(d)(1), also require that the application to purchase must show "[t]hat the land is actually used and occupied for the purpose of trade, manufacture or other productive industry * * *." (Emphasis added.)

The application to purchase must be filed within 5 years of the date of filing the notice of a claim under section 687a, supra. 43 U.S.C. § 687a-1; 43 CFR 2562.2(3)(c). An applicant must meet the requirements of the Act within that period.

In applying these principles to the facts of this case we must first point out that the Judge has misinterpreted the T & M statute where he held that appellant's activities could only qualify under the headquarters site provisions of the law. To the contrary, appellant's admitted use of this test site was in no way meant as the headquarters or principal location of his business.

The Act of May 14, 1898, supra, was amended in 1927 (Act of March 3, 1927, 44 Stat. 1364) to add the headquarters site provisions:

That any citizen of the United States twenty-one years of age employed by citizens of the United States, associations of such citizens, or by corporations organized under the laws of the United States, or of any State or Territory, whose employer is engaged in trade, manufacture, or other productive industry, and any citizen of the United States twenty-one years of age who is himself engaged in trade, manufacture, or other productive industry may purchase one claim, not exceeding five acres, of unreserved public lands, * * * in Alaska as a homestead or headquarters, under rules and regulations to be prescribed by the Secretary of the Interior, upon payment of \$2.50 per acre * * *. (Emphasis added.)

The regulations in 43 CFR 2563.1-1 state among other requirements, that the applicant must show the actual use of the land for which he is applying and the nature of his trade, business, or productive industry. Although the burden is similar for the applicant to show actual use of only 5 acres rather than the full 80 acres as in a T & M site, the nature of that use in relation to the primary business is quite different.

[2] This Board has previously examined headquarters site use and has determined that the term "headquarters" should be given its

usual meaning in these circumstances, which is, "the usual place of business, principal office or administrative center of an enterprise." Vernon L. Nash, 17 IBLA 332, 335 (1974). All evidence presented by appellant has been introduced with the purpose of establishing the test site as a needed auxillary use for his business. The site is helpful in the furtherance of his business, but that business is conducted at the primary location in Anchorage. Appellant has never asserted or attempted to show that he used the test site as the principal office or as a "headquarters" as contemplated by the statute or regulations. We do not find that his use of the T & M site as a testing ground has a life or business identity of its own. Nor could it be classified as the center of his enterprise.

However, we find no reason why appellant's testing activities, even if termed an adjunct to his business, cannot be considered under the T & M site provisions of the law. Therefore, if appellant's use qualifies at all, it is properly classified as a T & M site, whether it be limited to 5 acres or extended to the full coverage of 80 acres.

In our first consideration of this case we emphasized that the applicant is not required to establish his entire enterprise on the claimed site, but only that the site be used in connection with a trade, business, or productive industry. See also John B. Coghill, 29 IBLA 177, (1977). We ruled that physical separation of this site from the Anchorage business location by itself, did not take the applicant outside the purpose of the T & M law. The issue of whether appellant's business was considered a productive industry has never been a matter of conflict. We have accepted that business as a qualifying use if appellant could show the proper relationship of his test site to that business. Testing is a valid purpose in the furtherance of appellant's business. On remand of the case appellant bore the burden of proving the direct effect of his test site activities on his motorcycle and snowmobile sales and service business. David Burns, supra; Lance H. Minnis, 6 IBLA 94 (1972). The question for our deliberation at this juncture is whether appellant has met that burden of showing "direct and necessary economic purpose in furthering his enterprise."

From our review of the record we find that appellant has made a satisfactory showing that he has actively used the T & M site during the qualifying period from 1964 to 1969 ^{1/} for testing and improving his motorcycle and snowmobiles and that these activities served a direct and economic purpose in the total operation of his

^{1/} Burn's application to purchase the trade and manufacturing site was filed August 29, 1969, in which he claimed use and occupancy of the site from September 11, 1964.

business. In our opinion, appellant has demonstrated more than a mere casual connection between the test site and the primary business location.

Although the Solicitor questions appellant's type of use as not qualifying under the law and the regulations, we find that the activities conducted at the T & M site are sufficiently directly related to appellant's business as to be classified as an integral part of that business. In this type of retail sales and service operation it is not unreasonable to consider a research and development program as a useful aid to make appellant's operation more competitive and efficient in the market area. Thus, there is a valid purpose for these activities and appellant has clearly established that testing was actively carried out on the T & M site.

The Judge has criticized appellant's testing program as not being a systematic approach and characterized the economic effect of these activities as "most speculative and imprecise." As indicated, no sales were performed at the test site (Tr. 267, 273), and no specific revenue was recorded on appellant's business records as a result of the use of the site (Tr. 262, 266). Yet, testing and research is not expected to be a revenue producing part of a sales and service enterprise. Even though such activities were admittedly not the prime economic force behind appellant's successful business, it still may be concluded that these activities served a direct and necessary economic function in the business. There was ample evidence that a number of improvements and modifications were actually made on the motorcycles and snowmachines. 2/ Appellant repeatedly indicated changes were made in these machines to adopt to the Alaskan terrain and to improve the performance of these machines under more severe Alaskan conditions.

2/ Cited improvements and modification to snowmachines include:

- (a) Tilt cowling (Tr. 217)
- (b) Zerk fittings (Tr. 219)
- (c) Rear suspension reinforcing plates were manufactured on the site and obviated problems with worn-up tracks (Tr. 221),
- (d) Spline Clutch (Tr. 221)
- (e) Skileg spline (Tr. 223)
- (f) Track frame (para-rail) after 1969 (Tr. 229, 231),
- (g) Coil spring (Tr. 232) after 1973

and to motorcycles:

- (a) Forkhead bearings (Tr. 166, 171, 173, 205)
- (b) Chain Adjustment (Tr. 208, 209)
- (c) Carburetion/air cleaners (Tr. 211, 212, 213, 214)

The effect of these modifications and improvements was to lower the frequency of repairs which obviously would have a beneficial effect on any subsequent purchaser, although difficult to measure in dollars and cents. It also benefited appellant.

[3] Appellant asserts that specific evidence of increased sales related to the use of the test site does exist. We note that he has submitted additional exhibits 2 through 11 of affidavits obtained from individuals after the hearing which he contends shows additional "hard economic evidence of the benefit gained from the trade and manufacturing site and activity thereon." Generally, the basis for a decision made after a hearing is the evidentiary record made at the hearing, 43 CFR 4.24. New evidence offered on appeal after an initial decision is rendered by an administrative law judge may not be considered or relied upon in making a final decision but may only be considered to determine if there should be a further hearing. United States v. George R. Edeline, 24 IBLA 34, 37 (1976); United States v. McKenzie, 20 IBLA 38, 44 (1975). A further hearing has not been requested nor is one warranted in this case. Accordingly, we cannot consider these affidavits as a basis for our decision.

Without these submissions we take note that there are several points of record where appellant has made some showing of benefits derived from the use of the test site. Appellant did specifically attribute an increase in his sales, from 50 snowmachines the first year to 400 machines the second, as a direct result of his test site use (Tr. 210). The evidence adduced at the hearing showed that as a result of observing the enduro track usage, a Mr. George Murray purchased a trail bike (Tr. 183); Mr. Pete Huddleston and Mr. Larry Shivers both purchased motorcycles and later became snowmachine dealers due to Burns' T & M testing and Murray sold 17 motorcycles in the area near the T & M site as a result of the 1966 Lions Club races held on the enduro track (Tr. 189). In addition, appellant attributes increased publicity of his business from the promotional activities of the races and the movie made on his site in 1968.

A more measurable impact of these improvements on the machines and a concept much more persuasive of appellant's beneficial use of the T & M site is the reduction in warranty repairs. These improvements actually resulted in large warranty savings. Suzuki warranty work cost \$3.50 to \$3.75 per hour for Alaska shop labor, but Suzuki only paid Burns \$1.50 to \$1.75 per hour and would not reimburse him for freight costs incurred in shipping warranty parts to Alaska (Tr. 207). Similarly, Scorpion would only reimburse Burns at \$1.35 to \$1.65 per hour for shop time, but Burns had to pay his mechanics approximately \$4.00 per hour. In both cases, prior to the modifications, Burns was forced to absorb the differential, not passing it on to his customers. Accordingly, any program that cut

down repair work created a savings and correspondingly increased appellant's profit margin. Moreover, his standing with his customers and his suppliers would also improve.

The Solicitor again raises the 221-mile distance of the T & M site from appellant's Anchorage business location. He makes much of this distance implying that this has prevented the use of the test site as an essential part of appellant's business.

First, as we now view the case, the distance between these locations is no longer a primary factor for consideration. The Solicitor attempts to use this issue to question appellant's business motives when in the beginning of this proceeding he had already agreed to a dismissal of the charge that appellant had not occupied the site in good faith for the qualified purposes of the T & M law. This stipulation, taken with our earlier ruling that separation of the locations would not, of itself, prevent qualification under the law, effectively removes distance as a crucial factor. Irrespective of location, appellant has still the burden of showing that the site was actively used on a regular basis for the testing.

Second, this assertion is not an accurate representation of how appellant actually conducted his operation. It is clear from the record that appellant and his sons regularly used the test site during the qualifying period on weekends for the purposes of actual testing of motorcycles and snowmobiles. The Judge recognized that the distance was not a hindrance and did not prevent appellant from regular use stating: "Nevertheless, the evidence indicates that such travel was accomplished nearly every weekend by Mr. Burns or his sons * * *."

Also, the distance argument is a two-edge sword. Because appellant was willing to repeatedly go to such lengths to travel to the same isolated tract to use his cycles and snowmachines, one may reasonably conclude that his efforts were business oriented and nonrecreational rather than for sport. There are many closer areas to Anchorage more easily accessible for leisure riding of these types of machines. Also, we are persuaded that appellant selected this distant site because of previous difficulties with complaints concerning noise which caused him to give up on sites closer to Anchorage.

[4] We next turn to our consideration of what area of the T & M site has actively been occupied and used as an integral part of appellant's business. The true extent of appellant's use determines the size of the claim that is needed. An applicant can only obtain title to as much land in his claim as is actually occupied

by improvements and used and needed in his business. Golden Valley Electric Assn., 8 IBLA 368 (1972). We have also recognized that each portion of a trade and manufacturing site need not contain physical improvements. If appellant can show active use of unimproved land as an integral part of his business, that is sufficient to meet the requirements of the law. Lloyd Schade, 12 IBLA 316, 318 (1973).

In examining the difficult question of area of use for appellant's T & M site there is no problem with the 5-acre area which contains the noncontroversial improvements involved, *i.e.*, the log cabin, the oval track and the outhouse. The BLM field examiner's testimony (Tr. 67) and appellant's own admissions (Tr. 242) confirm the Judge's finding that these improvements lie within the 5-acre area which the Judge granted as a headquarters site. At least as to this area all parties appear in accord that it has been sufficiently improved and used for the purposes claimed by appellant.

The real difficulty develops when the review is expanded to include the other alleged improvements and the unimproved areas throughout the remaining 75 acres of the T & M site. Appellant originally claimed that his improvements covered a 25-acre area. On closer examination this proved to be an extremely liberal estimate. The 5-acre site was the central focal point of the improved area excluding the air strip, the boat harbor and the enduro track.

The Judge did not consider the use of the boat harbor as substantially connected to appellant's business. Appellant claims that the harbor was dug in 1968 and he has used this facility for unloading boxes of motorcycle and snowmachine parts near the cabin. He asserts the use of this facility is reasonably related and necessary to the activities carried out on the test site. The public highway is approximately three-fourths of a mile from the site. He contends that during the spring breakup and rainy weather access to the property is difficult over the road. He states the use of the Galkana River has facilitated transporting heavy test equipment, tools, and parts to the site and has maximized his testing efforts.

The Solicitor argues that this harbor improvement is not substantial because it is only a deepening of an existing channel. Since appellant is not in the boat business, the Solicitor maintains the harbor is not sufficiently related to his operation.

From our vantage point we find this use of the harbor area acceptable as a type of use reasonably related to appellant's business. Such use for unloading parts and transportation in bad weather during the spring would facilitate his commuting to and from the

test site and would aid in continued movement of his equipment. This would have a significant effect on his testing program, enabling continued testing under all weather conditions. Also, nothing in the record refutes appellant's assertions that this facility has been used in this manner.

By far, appellant's most persuasive argument for his need for the entire usable acreage within the 80-acre T & M site, is the snowmachine use over the entire property. Appellant asserts that he actively engaged in testing and developing snowmachines from 1966 to 1969, during the 5-year qualifying period (Tr. 192, 193). The key to successful snowmachine testing apparently is having large snow areas available so that unused snow can be used each time a test run is conducted. Unused snow is required to avoid reruns in previous tracks. Appellant states that similar results could not be obtained by using the same track twice.

We overturn the Judge's finding as to the significance of the use of the snowmachines to appellant's case. Appellant's use and testing of these machines is without question related to his business. He established that improvements were made on the machines as a result of his testing on the T & M site.

Appellant apparently used all the T & M site and more, using the Galkana River and some areas across the river (Tr. 192, 297) to conduct speed testing. The record adequately supports the claimed testing of the useable snow areas of the property for this purpose.

The Solicitor does not refute the fact this testing took place. He argues that this testing was purely a random scheme with no definite plan in mind and that any unrestricted land would have been sufficient for appellant's tests. He points out that appellant went anywhere he liked and did not confine himself to the property (Tr. 251).

Accepting this fact, we find appellant has made an adequate showing of extensive use of the T & M site as a base for these testing operations. The fact that he could use any unrestricted land for this same purpose does not detract from his actual use of the entire site for the claimed purpose or his need for the tract. It is not unreasonable in such circumstances for appellant to incorporate the use of the river and some other areas across the river for speed tests. Based on this use of the site alone, we would expand the area granted by the Judge to include all the remaining area applied for in the application. The nature of this snowmachine use, once substantiated, is such that it is impractical

to attempt to define the specific limits of any area that has not been used within the total site. Therefore, the logical course of action in these circumstances is to grant the application in full.

Since we find appellant is entitled to purchase the entire tract for these reasons, we need not determine whether the enduro track and airstrip were also qualifying improvements.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is modified to find appellant entitled to the full 80 acres described in his application as a T & M site, and not a headquarters.

Martin Ritvo
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Frederick Fishman
Administrative Judge

